

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OCT 24 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of Subpart E of)
Chapter 1 of the Commission's) CC Docket No. 94-93
Rules Governing Procedures to)
Be Followed When Informal)
Complaints Are Filed Against)
Common Carriers)

AT&T COMMENTS

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SUMMARY

The Commission's proposed revision to Section 1.716 of its rules, requiring greater specificity in informal complaints, may assist in overcoming the inefficiency and delay that currently characterizes the informal complaint process. To better assure that these revisions achieve their intended goals, informal complainants should also be required (and not merely "encouraged") to submit an additional copy of their filings for each carrier named, and to include a copy of relevant bills with complaints involving billing disputes.

By contrast, the proposed revision to Section 1.717 requiring the Commission to contact complainants even where their claim obviously has been satisfied, would divert scarce staff resources and should not be adopted. Further, the Commission should reject the proposed amendment of Section 1.718 to allow formal complaints to relate back, for limitations purposes, to the staff's letter to parties disposing of an informal complaint for the same claim. This change would unjustifiably prolong carriers' exposure to such claims, and undermine the substantive and jurisdictional two year limitations period prescribed by Congress in Section 415 of the Communications Act. Complainants' rights can be fully protected by instead requiring carriers to include information on the limitations period in their responses to informal complaints.

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AT&T COMMENTS

Pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, AT&T Corp. ("AT&T") submits these comments on the modifications to the Commission's procedural rules for informal complaints proposed in the Notice in this rulemaking proceeding.¹

Several of the modifications proposed by the Commission should contribute to more timely and efficient processing of informal complaints, while reducing the burden on carriers of investigating such claims, and these revisions thus should be promptly adopted. However, other proposed revisions would only exacerbate

¹ Amendment of Subpart E of Chapter 1 of the Commission's Rules Governing Procedures to Be Followed When Informal Complaints Are Filed Against Common Carriers, CC Docket No. 94-93, Notice of Proposed Rulemaking, FCC 94-211, released September 2, 1994 ("Notice").

the current inefficiency of the informal complaint process. In particular, the Commission's proposed revision to its current rule regarding "relation back" of subsequently formal complaints should be rejected, because this change would not provide any greater clarity or certainty for complainants and could seriously impair defendant carriers' rights under Section 415 of the Communications Act.

BACKGROUND

The Commission's informal complaint process established under Section 208 of the Communications Act, 47 U.S.C. § 208, "provides a vehicle for the resolution or satisfaction of complaints against carrier with streamlined procedures" ² As the Commission has explained:

"Informal complaints for the most part are correspondence or verbal communications complaining of a carrier's action and do not generally include legal or technical arguments. The informal complaint procedures contain the simplest and fastest means to obtain a carrier's response and/or resolution of the problem." ³

² See Amendment of Rules Governing Procedures To Be Followed Where Formal Complaints Are Filed Against Common Carriers, Report and Order, 3 FCC Rcd 1806, 1810 (¶ 39) (1988) ("Formal Complaints Order").

³ See Amendment of Rules Governing Procedures To Be Followed Where Formal Complaints Are Filed Against

(footnote continued on following page)

Such proceedings thus contrast markedly with formal complaints, which are adjudicative proceedings for resolution of factual or legal questions that often entail discovery and other procedures to develop a suitable record for decision.⁴

As the Notice points out (§ 3), over the past few years the Commission has been confronted with substantial growth in the volume of informal complaints, leading to severe problems in processing those filings. Chairman Hundt recently testified that informal complaints regarding telephone rates and service grew from 16,988 in 1992 to 31,024 in 1993.⁵ Concomitantly, the Commission's ability to handle these complaints in a timely manner has been seriously degraded. According to Chairman Hundt's testimony, more than 6,000 of the complaints filed during 1993 remained pending at the close of that year. The Commission's average time to resolve these complaints was 315 days in 1993; further,

(footnote continued from previous page)

Common Carriers, Notice of Proposed Rulemaking, 2 FCC Rcd 90 (§ 2) (1986).

⁴ Formal Complaints Order, 3 FCC Rcd at 1813 (§ 55).

⁵ Statement of Chairman Reed E. Hundt before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, concerning the 1995 Authorization Act for the Federal Communications Commission, May 26, 1994, reported at 1994 FCC LEXIS 2356.

over 5,000 informal complaints took more than a year to resolve.⁶

To address these problems, the Commission in this proceeding proposes several modifications to the current rules that are intended to better fulfill its "commitment to the prompt resolution of informal complaints" and to reduce unnecessary burdens both on the staff and carriers. See Notice, ¶¶ 1, 3.

As a carrier subject to the informal complaint process, AT&T has a vital interest in the efficient operation of those proceedings, and lauds the Commission's objective of reducing the delay and burdensomeness of the current procedures. With these objectives in mind, AT&T comments below on the specific rule revisions proposed in the Notice.

I. ALL INFORMAL COMPLAINTS SHOULD BE REQUIRED TO CONTAIN SUFFICIENT INFORMATION TO ALLOW CARRIERS TO INVESTIGATE AND PROVIDE RESPONSES TO THOSE CLAIMS.

The Notice points out (¶ 3) that many informal complaints omit important factual information required for the staff to make an assessment of the claim and to direct the complaint to the appropriate carrier(s) for resolution. The Commission therefore proposes to revise Section 1.716 governing the form of informal complaints

⁶ Id.

to provide that these filings must set forth "factual allegations that, if true, are sufficient to constitute a violation" of the carrier's legal obligations.⁷

AT&T strongly agrees with the Commission that informal complainants should be required to state with specificity all material information regarding their claims.⁸ Completeness in this respect is a minimum obligation of any complainant seeking to invoke the Commission's processes.⁹ The omission of key information

⁷ Notice, ¶ 4 and proposed Section 1.716(a). The revised rule also expressly extends the reach of informal complaints to violations of the Commission's rules and policies, as well as of the Communications Act. Compare current Section 1.716(a) (requiring a showing that the carrier "did or omitted to do anything in contravention of the Communications Act"). AT&T does not oppose this extension, because in practice the Commission staff already administers the informal complaint process as if it applies to violations of its regulations and policies.

⁸ Currently, as the Notice (¶ 3) acknowledges, many informal complaints lack sufficient information even to identify the carrier whose conduct is at issue. Such omissions impair the staff's administration of informal complaints and often impose undue burdens on carriers. For example, it appears the Commission routinely forwards to AT&T all informal complaints concerning 800 Service in which the service provider is unidentified, and which AT&T's investigation often shows involve some other carrier.

⁹ The Notice indicates (¶ 3) that the Commission staff now expends considerable efforts contacting informal complainants to obtain information missing from their filings. Under the proposed revision to Section 1.716, this use of scarce administrative resources would be both inappropriate and unnecessary. Instead, deficient complaints may be returned to the filing party with a brief notation of their

by the complainant apparently often precludes the Commission staff from determining at the threshold that the claim is lacking in merit, and thereby to avoid burdening the named carrier(s) with the necessity of responding to those filings.¹⁰ It is also readily apparent that the absence of critical data regarding the claim seriously hampers a carrier's ability to investigate and respond to an informal complaint in a timely manner.

The Notice also points out (§ 3, 6) that informal complainants raising billing disputes routinely omit copies of the bill statements relating to those charges, resulting in additional burdens on staff resources. Moreover, the Commission observes (id., § 5) that under present practice the need to copy informal

(footnote continued from previous page)

inadequacy, and that party may then attempt to cure the defect(s) and refile the complaint.

¹⁰ Although one of the objectives of the Commission's proposed revision is "to enable FCC staff to assess the merits of [informal] complaints more quickly" (Notice, § 4), AT&T's experience indicates that such filings are now routinely forwarded to it by the staff even when they are glaringly deficient on their face (e.g., because timebarred under Section 415 or because they complain about the level of tariffed interstate rates that Section 203 requires to be charged). In order for the informal complaint process to function efficiently, such meritless claims must be initially identified and returned to the complainants, without diverting additional resources of the staff or carriers.

complaints for service upon carriers results in a substantial expenditure of staff resources, as well as in processing delays. To remedy these problems, the revised rules would "encourag[e]" informal complainants to supply an additional copy of their filing for each carrier named in the complaint, and to file a copy of the pertinent bill(s) in claims raising billing disputes.¹¹

AT&T endorses the Commission's goal of expediting the processing of informal complaints embodied in these proposed rule changes.¹² However, in view of the serious adverse consequences their omission has on the efficiency of the informal complaint process, there is no reason for the Commission to limit itself to merely "encouraging" complainants to supply bills or additional copies of their filings. Informal complainants should be expressly required to furnish these items as a condition

¹¹ See Notice, ¶ 5-6 and proposed Section 1.716(b), (c).

¹² The need for the staff to copy informal complaints apparently contributes to serious delays in forwarding those filings to carriers for resolution or response. In 1993, the average interval between the Commission's receipt of informal complaints and their service on AT&T was 63 days; for 14 percent of the total, the interval was 90 days or more. Some current staff practices also magnify the delays caused by the need to copy pleadings. For example, it appears that the staff frequently collects and holds similar informal complaints before forwarding the "batch" of these filings to AT&T for response. This results in processing delays of up to several months with respect to the earliest filings in each such batch.

of perfecting their filings. Such a requirement will impose no significant burden on individual complainants, and will alleviate a substantial drain on the Commission's resources.¹³

II. REQUIRING STAFF CONTACT WITH ALL INFORMAL COMPLAINANTS IS UNNECESSARY AND WOULD STRAIN THE COMMISSION'S SCARCE RESOURCES.

Currently, Section 1.717 permits the Commission to consider an informal complaint closed, without undertaking further communication with the complainant, if it appears from the carrier's response or "other communications with the parties" that the claim has been satisfied. Under the proposed revision, however, the Commission would instead be obligated in every case to contact the complainant regarding the disposition of the claim.

This revision makes little apparent sense, especially in view of the Commission's severe resource constraints that admittedly have seriously impaired its ability even to forward complaints to carriers in a timely manner. The Notice's explanation (§ 8) that the revision "conform[s] the rule to our existing practice"

¹³ Contrary to the implication in the Notice (§ 5), copying machines are readily available not only to "commercial complainants" but also to the individual customers who account for the vast majority of informal complaints.

of routinely contacting complainants and carriers when the staff disposes of complaints begs the question.¹⁴ To conserve its scarce resources, the Commission should instead liberally avail itself of the latitude now available under Section 1.717 to close obviously satisfied complaints without further contacts. Put simply, no revision in the Commission's rule is warranted; rather, what is called for is a change in the way the Commission administers its present rule.

III. CHANGING THE BASIS FOR CALCULATING "RELATION BACK" OF FORMAL COMPLAINTS WOULD SEVERELY PREJUDICE CARRIERS AND SHOULD BE REJECTED.

Section 415 of the Communications Act, 47 U.S.C. § 415, provides that all complaints against carriers for violation of the statute must be brought within two years of the time the cause of action accrues

¹⁴ The Notice's additional claim (§ 7) that "[i]n actual practice" the Commission staff and not the named carrier conducts the investigation of an informal complaint is even more seriously misplaced. Indeed, to AT&T's knowledge none of the informal complaints filed against it in recent years has been independently investigated by the staff. In all events, the Commission staff clearly lacks the resources necessary to investigate even a small fraction of the informal complaints lodged with it. Moreover, as shown in Part C below, any such investigation by the staff would be pointless because the Commission lacks the legal authority to adjudicate an informal complaint where the carrier declines to satisfy the claim.

"and not after."¹⁵ The Commission's current rules purport to afford complainants a narrow avenue of procedural relief from this stringent limitations period by permitting formal complaints to relate back to the date of filing of an informal complaint for the same cause of action, provided that the formal complaint is filed within six months of the carrier's report refusing to satisfy the informal claim.¹⁶ The Notice now proposes to expand this exception by allowing relation back for formal complaints that are filed up to 60 days after the Commission staff has informed the parties in writing of its disposition of the informal complaint.¹⁷

This revision to the Commission's rules would seriously prejudice the rights of defendant carriers by depriving them of the certainty accorded by the Communication Act's statute of limitations, and should

¹⁵ It is settled law that this limitations period, like the counterpart provision of the Interstate Commerce Act on which it is based, is not merely a matter of affirmative defense, but is a substantive and jurisdictional bar to prosecution of the complaint. See Tele-Valuation, Inc. v. AT&T, 73 F.C.C.2d 450, 453-54 (1979); Armstrong Utilities Inc. v. General Tel. Co. of Pa., 25 F.C.C.2d 385, 389 (1970); Thornell-Barnes Co. v. Illinois Bell Tel. Co., 1 F.C.C.2d 1247, 1251 (1965); cf. 49 U.S.C. § 11706.

¹⁶ See Section 1.718. It is questionable, however, whether the Commission may apply the rules in this manner to circumvent the statutory limitations period prescribed by Congress.

¹⁷ See Notice, ¶¶ 9-10 and proposed Section 1.718.

not be adopted by the Commission. Typically, the Commission staff's communications to informal complainants regarding the disposition of their matters are not issued until many months after the carrier has returned its report denying liability for that claim.¹⁸ The practical effect of this rule change would thus be to extend virtually without limit the time within which informal complainants could pursue formal complaints for their claims.¹⁹

The Commission has identified no basis for the rule change that could justify subjecting carriers to this additional exposure and uncertainty. The Notice merely claims (§ 9) that the current rule results in the filing of numerous "unnecessary" formal complaints while the staff's investigation of an informal claim that a carrier has refused to satisfy is still in progress.

¹⁸ For example, AT&T's records indicate that 300 informal complaints which the Commission forwarded to AT&T for investigation during 1993, and to which AT&T promptly responded during that year, have still not been closed by the Commission staff. Moreover, even for those 1993 informal complaints against AT&T which the Commission has closed, the average interval between the submission of the claims to AT&T and the Commission's notification that it had closed those matters was 10 months.

¹⁹ For this reason, were the Commission to adopt this proposed rule change it should, at a minimum, require that the staff's disposition be issued not later than 30 days from the date of the carrier's report returning the informal complaint unsatisfied.

However, because contested informal complaints are not adjudicative proceedings, any staff investigation of unsatisfied informal claims is beside the point since the Commission is not authorized to make dispositive findings regarding such claims.²⁰ To secure such relief from the Commission, parties must instead file timely formal complaints in accordance with Sections 208 and 415 of the Communications Act.

Likewise misplaced is the Notice's additional concern (§ 9) that, in the absence of a staff disposition letter, informal complainants may not be made aware of the filing deadline for instituting a formal complaint. The Commission staff has for several years required carriers responding to an informal complaint to serve

²⁰ See Formal Complaints Order, 3 FCC Rcd at 1813 (§ 55) (distinguishing adjudicative character of formal complaints from the informal complaint process). This is not to say that the informal complaint process serves no useful purpose. In addition to providing an avenue for speedy, consensual resolution of customer disputes with carriers, the Commission has frequently used its monitoring and oversight of informal complaints to identify practices requiring changes in the Commission's regulations. See Policies and Rules Concerning Toll Fraud, 8 FCC Rcd 8618, 8621 (§ 6) (1993) (rule revisions proposed in light of numerous "informal complaints that raise toll fraud issues"); Policies and Rules Concerning Interstate 900 Telecommunications Services, 6 FCC Rcd 6166 (§ 2) (1991) (Commission proposed pay-per-call rules "in response to the large number of consumer complaints the Commission has received" on 900 services); Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd 2744 (§ 5) (1991) (the Commission "has considered the issues raised in informal complaints" in rulemaking on operator services).

with their acknowledgement of having received those claims a Commission-developed information sheet titled ICB-FS-Procedures, which explains the complaint process and the complainant's right to file a formal complaint. If any additional protection is warranted, the Commission can readily modify its existing informal complaint rules to require carriers to provide information specified by the Commission, including the need to file any formal complaint within six months of the carrier's report returning the claim unsatisfied.

CONCLUSION

For the reasons stated above, the Commission should adopt the proposed revisions to Section 1.716 of the rules, with the additional modifications to those regulations described in these Comments, to improve the expeditious and efficient processing of informal complaints. However, the Commission should reject the Notice's proposed revisions to Sections 1.717 and 1.718 which would lead to additional inefficiency and seriously impair carriers' rights under the Communications Act. The Commission should instead modify Section 1.718 as

described in these Comments to assure that informal complainants are timely apprised of their procedural rights to pursue formal complaints.

Respectfully submitted,

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